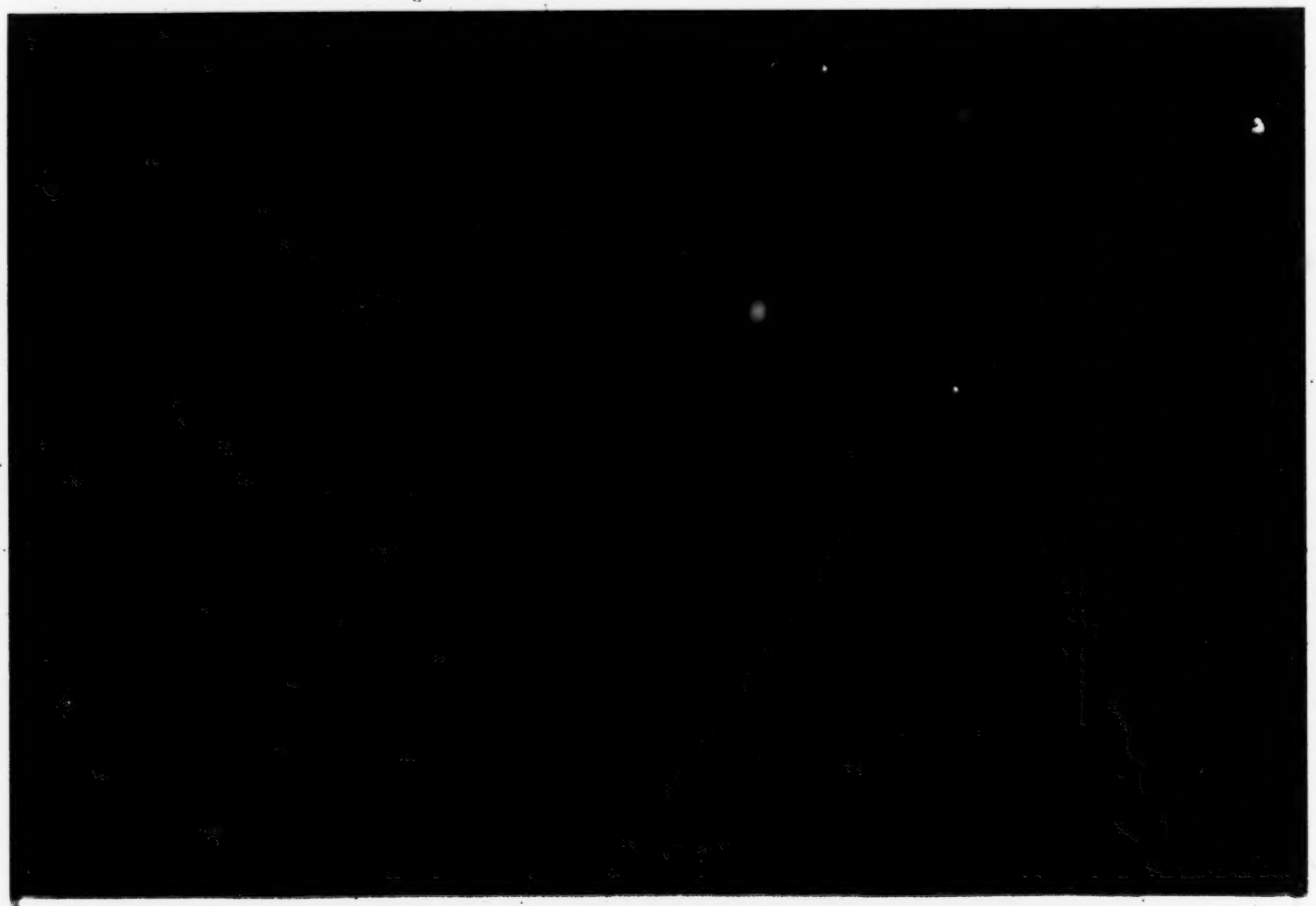

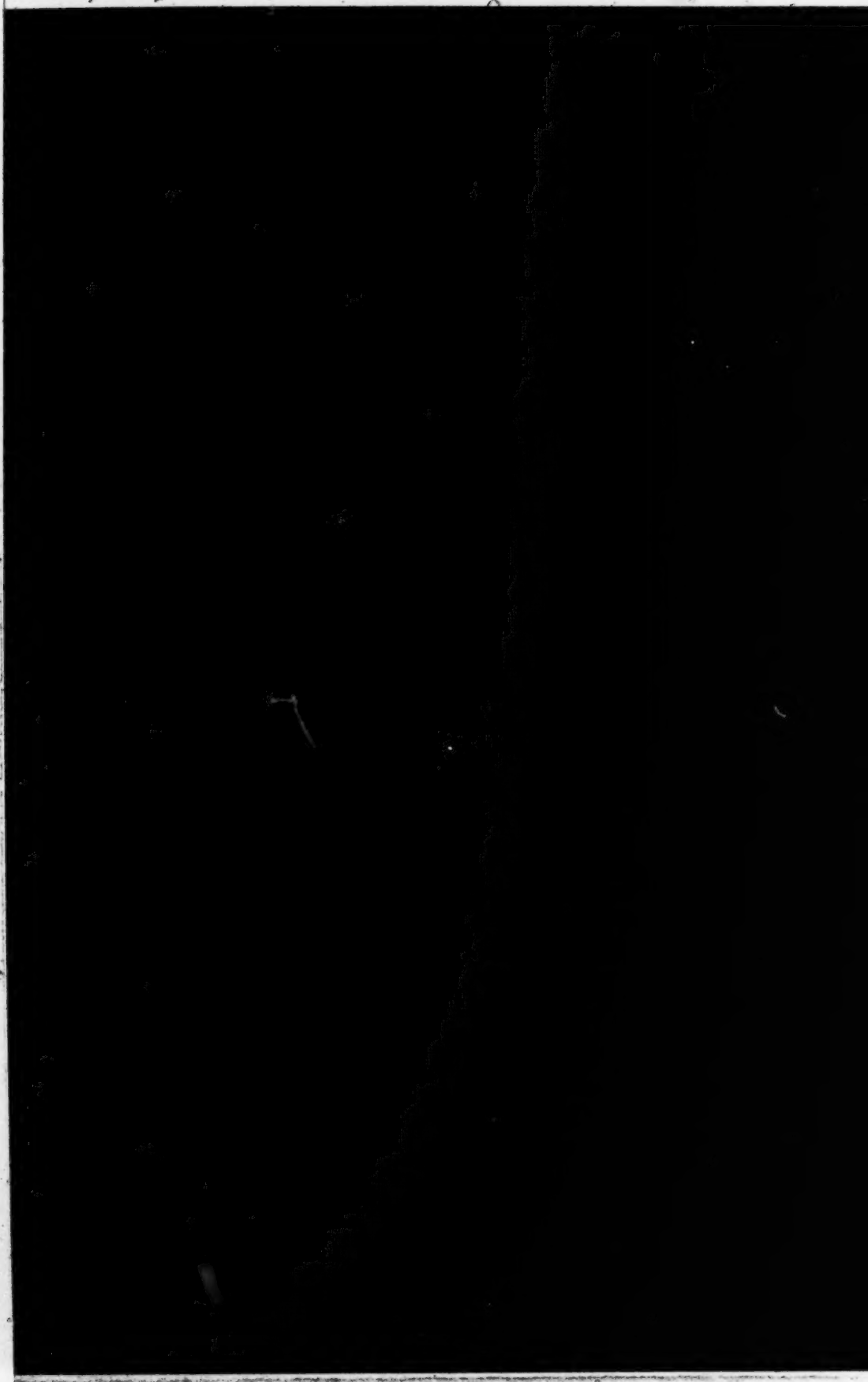

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 274

HELEN MASCUILLI, ADMINISTRATRIX OF THE ESTATE OF ALBERT MASCUILLI, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–2a) is reported at 358 F. 2d 133. The opinion of the district court (215a–238a) is reported at 241 F. Supp. 354.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1966 (Pet. App. 3a), and a timely petition for rehearing was denied on March 24, 1966 (Pet. App. 4a). The petition for a writ of certio-

[1] References "a" and "App." are, respectively, to "Appendix for Appellant" and "Appendix for the United States" filed in the court of appeals. These appendices have been filed by petitioner in this Court.

225-296—66

rari was filed on June 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the vessel on which the accident occurred was unseaworthy either because the winch cut-offs were improperly set or because the negligence of the longshoring crew rendered the vessel unseaworthy as a matter of law.

STATEMENT

Petitioner commenced this admiralty suit against the United States for damages on account of the death of Albert Mascuilli, an employee of Northern Metals Company, a stevedore contractor. The decedent was accidentally killed on May 1, 1959, while working as a longshoreman aboard the U.S.N.S. MARINE FIDDLER, a heavy-lift cargo vessel owned and operated by the United States. On the day of the accident, Northern Metals' longshoremen were loading 61¼-ton Army combat tanks into the vessel's No. 3 hatch, using a swinging jumbo boom capable of handling up to 150 tons of cargo (216a–217a).[1] The vessel's loading gear functioned according to ordinary stevedoring principles, and its rigging arrangements were similar to those used on other vessels (App. 182–183).[2] The longshoring crew, of which petitioner's decedent was a member, contained experienced winchmen, and had been instructed in the use of the vessel's winches and

[1] Diagrams 1 and 2, *infra*, pp. 3-5, illustrate the operation and rigging of the heavy-lift boom.

[2] The design, drawings and specifications for the MARINE FIDDLER's heavy lift gears had been approved by the American Bureau of Shipping (App. 180–181).

the operation of its heavy-lift gear (31a, 83a, 86a–87a; App. 81–82). That crew's [illegible] foreman assured the vessel's chief mate that his crew was experienced and understood the operation of the MARINE FIDDLER's gear, having previously worked the ship (130a). The longshoremen were checked out on the proper operation of the vessel's loading gear, and several times during the day's operations were warned against tightlining—*i.e.*, permitting the vessel's after port and forward starboard vangs[*] to become simultaneously taut (120a–121a, 134a; App. 81).

Northern Metals' longshoremen successfully lifted and stowed eight tanks into hatch No. 3, thereby demonstrating that they understood and could handle capably the vessel's gear (220a; App. 81–82, 84, 90). The longshoremen then raised the ninth tank from the pier and brought it onto the deck in order to clear a space in the hold. They next moved the tank over the square of the hatch, and had partially lowered it into the hold when the shackle connecting the after port vang spreader to the flounder plate on the end of the boom suddenly, and without warning, parted, causing the port vang and its rigging to recoil and fatally strike petitioner's decedent, who was working on deck as a tag line tender (see 220a–221a; Diagrams 1–2).

After a trial before the court, sitting without a jury, judgment in favor of the United States and against petitioner was entered (237a). The court,

[*] Vangs are guy lines, designed only to swing the boom horizontally; they do not support the weight of the cargo (219a–220a).

in its detailed Findings of Fact and Conclusions of Law, ruled that (230a):

> * * * the vessel and all of its equipment was in a seaworthy condition at all times, and remained so throughout the entire loading operations. The accident was caused solely by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause the accident to occur so instantaneously that the Third Officer was unable to warn anyone or prevent its happening.

The court of appeals, "upon consideration of the whole record, including, inter alia, [petitioner's] thorough statements of her view of the questions involved," affirmed (Pet. App. 1a–3a).

ARGUMENT

The district court determined that the shackle parted solely because Northern Metals' longshoremen failed to comply with proper operating procedures—specifically that the directions of the company's signalman-foreman were either not proper or were ignored by the winchmen (227a–230a). The court of appeals held that the district court's findings of fact were not clearly erroneous (Pet. App. 1a–2a). We submit that there is no issue warranting further review.

1. Petitioner argues that the MARINE FIDDLER was unseaworthy because its winch cut-offs were improperly set and therefore failed to prevent excessive strain on the shackle (Pet. 6–8). She cites no evidence to support this theory. The district court found that the winch cut-offs, which were not designed to prevent the type of accident that occurred here, were seaworthy (225a–227a, 234a). The finding

is fully supported by the evidence—including undisputed expert testimony that the settings of the winch cut-offs were proper and sound for use in the vessel's rig (App. 145–146, 148–149).

None of the winch cut-offs at hatch No. 3, however set, could have prevented the excessive strain on the after port shackle (App. 158–159). At the time of the accident, both the after port and forward starboard vangs were taut, thereby creating a tightline condition along a line in which the shackle was a link (Diagram 2). The after port vang winch was set at paying-out position "1" (App. 38); the forward starboard winch had just ceased heaving in and was in neutral; and the after starboard winch was set at heaving-in position "2". Neither the after port winch's cut-offs nor those of the forward starboard winch could trip in these positions (App. 119–120, 140–142, 150–152), and the after starboard winch's cut-offs—which were in good working order (App. 114–115)—could not have prevented or even measured the force which that winch was creating along the tightline. Indeed, there was no known safety device that could have prevented this accident (222a; App. 158–159, 216).

Since the MARINE FIDDLER's winch cut-offs were properly set, were sound for use in the rig and had no causal relation to the accident, which was caused my a lack of attentive and coordinated operation of the winches (230a; App. 158–159, 216), petitioner's reliance upon this Court's decision in *Crumady* v. *The Joachin Hendrik Fisser,* 358 U.S. 423 (Pet. 6–8), is misplaced. The evidence in that case established that the winch that served the J. H. FISSER's boom was improperly set and rendered the vessel unseaworthy.

2. Petitioner next contends that the stevedoring crew's negligence, which caused the death of her decedent, rendered the vessel unseaworthy (Pet. 8–11). In the circumstances of this case, such conclusion is, we submit, unwarranted.

The accident occurred because the longshoremen negligently permitted a tightline condition to develop along the after port and forward starboard vangs. The vessel's third mate was observing the loading operations, but was unable to prevent the tightline condition because it happened suddenly and without warning; he had no time to warn or instruct the winchmen or the signalman-foreman before the accident occurred (220a–221a, 230a). In these circumstances, the courts below correctly held that the vessel did not become unseaworthy on account of the longshoremen's momentary mishandling of seaworthy equipment. None of the cases cited on pages 8–11 of the Petition hold to the contrary. Indeed, in one of them—*Norfleet* v. *Isthmian Lines, Inc.*, 355 F. 2d 359 (C.A. 2)—the court ruled expressly that if the longshoreman's injury resulted from negligent mishandling of a seaworthy appurtenance, and if the injury occurred before any unseaworthy condition arose, the shipowner would not be liable in an action based on breach of the warranty of seaworthiness. 355 F. 2d at 364.

3. Finally, petitioner argues (Pet. 11) that the district court was required to hold the MARINE FIDDLER unseaworthy on the basis of its determination that (236a):

> The longshoremen crew was not "equal in disposition and seamanship to the ordinary men in the calling" at the time the ninth tank was being loaded.

Petitioner has misread this statement. The record establishes that the longshoremen were experienced, had been instructed in the use of the winches and the operation of the heavy-lift gear, had been warned of the dangers in tightlining, and had successfully loaded eight tanks before the accident occurred (11a, 68a, 86a–87a, 130a–131a, 134a; App. 81–82). In these circumstances, and in the light of the district court's findings and conclusions as a whole (see 218a–220a, 227a–230a, 234a–236a), it is clear that the court was not of the view that the longshoremen were incompetent, but found only that they were negligent "at the time the ninth tank was being loaded." As this Court's opinion in *Boudoin* v. *Lykes Brothers Steamship Co.*, 348 U.S. 336, makes clear, a single act of negligence by otherwise competent longshoremen would not in itself require the conclusion they were unequal in seamanship to the ordinary men of the calling. 348 U.S. at 339–340. Were that the rule, the shipowner would be absolutely liable for any negligent act of longshoremen in connection with loading or unloading the vessel.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JOHN W. DOUGLAS,
Assistant Attorney General.
ALAN S. ROSENTHAL,
HOWARD J. KASHNER,
Attorneys.

JULY 1966.

APPENDIX

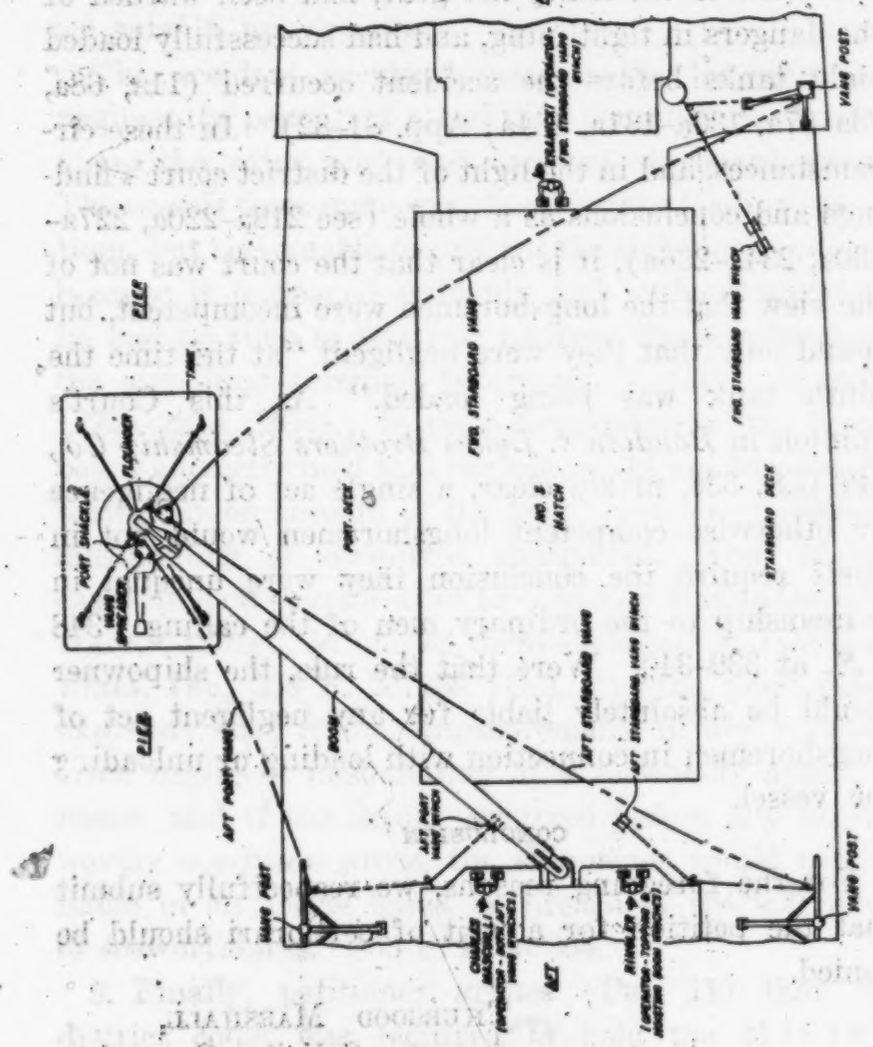

DIAGRAM 1.—*Pier loading position.*

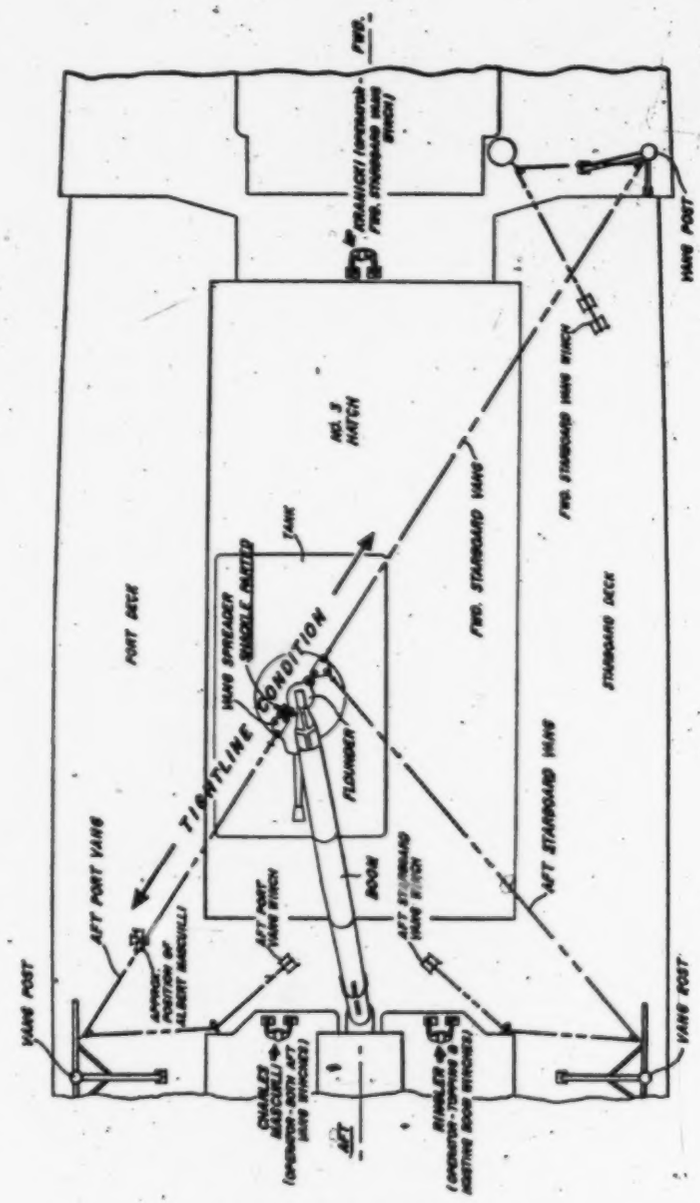

DIAGRAM 2.—*Position before parting.*

U.S. GOVERNMENT PRINTING OFFICE: 1966